Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

LEVY JAMES III,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Do continuous unconstitutionally adverse rulings on a criminal defendant's motions for mistrial and other evidentiary matters as well as the exclusion of expert testimony on the potential effect of controlled substance ingestion on an alleged victim deny the defendant his due process right to a fair trial?

PARTIES TO THE PROCEEDING

1. Mr. Robert H. Citronberg, Esq., Counsel for Petitioner.

2. Mr. Robert Coker, Esq., Dekalb County District Attorney, Appellate Counsel for the State.

3. Mr. Levy James III, Petitioner/Defendant.

4. Mr. Robert Statham, Esq., Dekalb County District Attorney, Trial Counsel for the State.

5. Ms. Jeanne Strickland, Esq., Assistant Attorney General, State of Georgia.

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OPINIONS BELOW

The opinion of the Supreme Court of Georgia is reported at __ Ga. __, (1999), 513 S.E.2d 207 (Ga. 1999) (App. A). Excerpts from the trial court appear in the Appendix (App. B). The decision of the Supreme Court of Georgia denying reconsideration on March 18, 1999 is contained in the Appendix (App. C).

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Georgia was entered on March 1, 1999. A timely petition for reconsideration was denied on March 18, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where the crime shall have been committed.

The Fourteenth Amendment to the United State Constitution provides in pertinent part: "[n]or shall any State deprive any person of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

On April 24, 1996, Petitioner Levy James III arrived at a shoe hospital belonging to Mr. Steven Hood (hereinafter referred to as the decedent). The shoe hospital was located in a strip mall in Dekalb County, Georgia. Mr. James (hereinafter referred to as the Petitioner), who considered Mr. Hood a friend, began to talk to individuals who were

already in the shoe hospital. Shortly after Petitioner arrived, he was asked by the decedent to move his car which he had parked in the drive through area of the hospital where witnesses testified others had parked in the past. Those present at or in the vicinity of the shoe hospital included the decedent's fiancee, and a number of acquaintances of the Petitioner and the decedent. The Petitioner, who had begun eating, was asked to move his car by the decedent. After not immediately moving his car, the Petitioner was confronted by the decedent who again demanded the vehicle be moved. As Petitioner had begun to exit the shoe repair to move his vehicle the decedent followed him outside the door. Outside the store the conversation grew more heated, with the decedent indicating he would "whoop [the Petitioner's] ass". Petitioner then entered his vehicle, and was asking that the decedent "get out of his face", as well as telling the decedent five times he needed to get away from his car. Nonetheless the decedent, who could have walked away, continued to argue. One individual tried to get the decedent to walk away, and asked the decedent to "let it go", but the decedent refused and returned back towards the Petitioner's car, where he was now seated. After more arguing, the Petitioner pulled out a weapon which he did not point at the decedent. To this action, the decedent responded "So what, you going to shoot me, then shoot me . . . you won't fight me like a man . . . you know I'll whip your ass if you fight me like a man." The argument continued and the Petitioner ultimately fired the weapon several times. One witness indicated that he saw the decedent "go toward the window of the car and that's when the gunshots started going off", and that the decedent reached in the car, and that's when he was shot, although other witnesses had different recollections. After the shots were fired some witnesses alleged the Petitioner stepped from his vehicle and made some type of remark to the decedent. The decedent died having received eight gunshot wounds, although the medical examiner could not state in which order the wounds were received by the decedent.

Prior to trial, the Petitioner notified the court and opposing counsel that he would seek to introduce the testimony of Dr. John Holbrook. Dr. Holbrook is employed by the Mercer University School of Pharmacy and the Department of Pharmaceutical Sciences. He is professor in the Department of Pharmaceutical Sciences and Director of the Center of Substance Abuse and Research. Dr. Holbrook proffered testimony was that he had conducted research into the effects of marijuana on animals, and had reviewed articles on the effect of marijuana in human beings. He proffered that marijuana's active agent, delta-9 THC can have a variety of effects on the human being — it can be a depressant, it can be hallucinogenic, or it might produce a euphoric state. The depressant effect can cause a disinhibition of behavior, similar to the effects of alcohol. Dr. Holbrook would have testified that marijuana effects the ability to think and reason, and that this disinhibition can result in a person taking risks, as well as affecting a person's ability to think and reason. Marijuana usage may also cause an individual to exert behavior that they would normally have under control. Doctor Holbrook testified that the autopsy results of the decedent indicated that the he had a THC level of 50-100 nanograms per milliliter in his blood, which he characterized as a moderately high dose, and that dose could have caused the disinhibition of behavior referred to in his earlier testimony. On cross examination, Dr. Holbrook indicated that the dosage in question would have indicated that the person would have smoked the substance recently, or was a chronic user who had smoked it in the last few days. Despite the contentions of the Petitioner, the court declined to allow the testimony of Dr. Holbrook or the introduction of evidence of the amount of marijuana in the bloodstream of the victim. The trial court excluded such testimony from evidence (Motion hearing pp. 162-163).

Prior to the trial of the case at bar, Petitioner filed a number of motions that were granted by the trial court. These

included a Motion to Enjoin the Victims family from showing Emotion in the Courtroom While Sitting as Spectators, a Motion in Limine to Restrict the Use of the Word "Murder" and a Motion to Prohibit Jury's Exposure to Victim's Family or Friends". All the Petitioner's motions were granted. All the court's rulings were violated.

On the first day of trial, early in jury selection, counsel for Petitioner noticed that family members of the decedent had entered the courtroom and were wearing photographs of the decedent. The buttons gave the dates of the birth and death of the decedent, as well as saying in large print "ALIVE IN OUR HEARTS". Counsel asked that the entire panel be dismissed, which was denied. Counsel then established that the entire panel had been potentially exposed to the buttons. Nonetheless, the court refused to dismiss the panels. The trial court did warn that further outbursts by family members would not be tolerated. Later in the voir dire another juror testified that she had seen the pin, when all the prospective jurors were present in the courtroom. The court, despite the fact that this juror had seen the memory pin, and that all the jurors were exposed to it, declined to excuse even the one juror.

One of the first witnesses for the State was Detective Mark Anglin, who immediately testified that his first duty involving this case was to respond to the scene of the "murder". Despite the earlier grant of Petitioner's motion to restrict the use of the word murder, it had been injected into the trial by the State anyway. Counsel for the State stated he had "neglected" to tell the officer of the court's ruling. The trial court again denied Petitioner's motion for mistrial.

Later that day, one of Petitioner's trial counsel was cross-examining a key witness, George Durham. The following colloquy occurred —

Q. (Continued by Mr. Mann) Which occurred? Which is the truth, what you said today in court, or what you said right after the incident? What's the truth?

A. It seemed like to me both. Both of the stories are similar. I had — I had at that particular date, I had just witnessed a close friend of mine get killed, so me exactly pointing out step-by-step what happened, I don't think — it would have been impossible for anybody to do that, Anybody that was there.

AN UNKNOWN OBSERVER: That's right.

Counsel for Petitioner again moved for a mistrial. Counsel for the State conceded that in fact there was an outburst. The outburst was by a member of the decedent's family. The court nonetheless again denied Petitioners motion for mistrial. Petitioner's motion for mistrial specifically cited the Constitutional provisions involved. (T-642).

Later, that same day, during the direct examination of Kendrick Lofton, the District Attorney representing the State of Georgia elicited the following from it's witness:

Q. Okay. Go On. After he said that, what happened?

A. Steve said, well, bust me then . . . And I was — I started crying, because I knew the guy, and it was like, I thought it was just a little arguing or whatnot. And he — I don't know, *he just shot him down like a dog*. (Emphasis supplied). (Petitioner's counsel during trial also unsuccessfully objected to the testimony of the

> decedent's fiancee in identifying a photo of the victim as ". . . the person I loved", as well as a portion of the closing argument intended to evoke sympathy for the family of the victim.)

Counsel again asked for a mistrial citing the Constitutional provisions involved. (T-660). A ruling on Petitioner's motion was reserved at this time, and denied in essence by the denial of Petitioner's motion for new trial before the trial court. Petitioner argued in his brief to the Supreme Court of Georgia that the conduct in this case deprived Petitioner of his rights under the United States and Georgia Constitutions, specifically citing his right to a fair trial.

REASONS FOR GRANTING THE WRIT

THE PETITION SHOULD BE GRANTED BECAUSE THE EXCLUSION OF EVIDENCE COUPLED WITH THE CONTINUAL DENIALS OF PETITIONER'S MOTIONS FOR MISTRIAL AND OTHER EVIDENTIARY ERRORS DENIED HIM A TRIAL IN ACCORD WITH TRADITIONAL AND FUNDAMENTAL STANDARDS OF DUE PROCESS.

In *Montana v. Egelhoff*, __ U.S. __, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996), this Court considered whether the Due Process Clause was violated by a Montana statute which provided in part that voluntary intoxication could not be considered in determining the existence of a mental state which is an element of a criminal offense. In its decision, this Court carefully noted that the Due Process clause was not offended by the State statute in that instance, insofar that evidence may be excluded for a valid reason. The Respondent in that case had relied heavily on *Chambers v. Mississippi*, 410 U.S. 284, 294 S. Ct. 1038, 1045, 35 L. Ed. 2d 297

(1973), which stated that "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." This Court held in *Chambers* that "[t]he exclusion of certain evidence, **coupled with** the State's refusal to permit [petitioner] to examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process." 410 U.S. at 302, 93 S. Ct. at 1049. Although this Court in *Egelhoff* indicated that *Chambers* was an exercise in highly case specific error correction, it indicated that the holding of *Chambers*, if one can be discerned from such a fact intensive case — is certainly not that a defendant is denied a fair opportunity to defend against the State's accusations whenever critical evidence favorable to him is excluded, but rather that erroneous evidentiary rulings can, **in combination**, rise to the level of a due process violation.

Petitioner submits that this combination of erroneous rulings is exactly what combined to produce an unfair trial and deny Petitioner his Constitutional rights to due process and a fair trial in this case.

Initially, the trial court excluded the testimony of Petitioners expert on the issue of the disinhibiting effects of marijuana. The purpose of the proffered evidence was to allow the juror to consider why the victim had acted as he did no the day in question, a matter crucial to Petitioner's defense.

Although not by itself initially specifically identified at trial as an error of Constitutional magnitude, its' exclusion **combined with** the continued prejudicial occurrences resulting in the repeated motions for mistrial cited above denied Petitioner a fair trial. In her dissenting opinion in *Egelhoff*, Justice O'Connor, relying on *Chambers*, *supra*, *Crane v. Kentucky*, 476 U.S. 683, 690-691, 106 S. Ct. 2142,

2146-2147, 90 L. Ed. 2d 636 (1986), and *Washington v. Texas* 388 U.S. 14, 23, n.21, 87 S. Ct. 1920, 1925, 18 L. Ed. 2d 1019 (1967) indicated that "[t]hese cases, taken together, illuminate a simple principle: Due process demands that a criminal defendant be afforded a fair opportunity to defend against the State's accusations." In *Turner v. Louisiana*, 379 U.S. 466, 85 S. Ct. 546 (1965), this Court indicated that "A fair trial in a fair tribunal is a basic requirement of due process", citing *In re Murchison*, 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955). *See also Parker v. Gladden*, 385 U.S. 363 (1966).

Following *Egelhoff*, the Fifth Circuit, in *Little v. Johnson*, 162 F.3d 855 at 860 (5th Cir. 1998) ruled that ". . . *Chambers* and *Green* stand for the limited proposition that "certain egregious evidentiary errors may be addressed by the due process clause." citing *Barefoot v. Estelle*, 697 F.2d 593 (5th Cir. 1983).

Petitioner submits that the combination or errors which occurred in this case, culminating with the outrageous comment elicited from the State that the Defendant just ". . . shot [the victim] down like a dog." cries out for a "case specific error correction" of the due process violations that occurred during Petitioner's trial.

CONCLUSION

The case presents a question of monumental importance not only to the Petitioner in this case, who received a life sentence, but to those who believe that the criminal justice system and its ultimate conclusion, a jury trial, is a system designed to insure that a person charged with a crime should receive a "fair trial in a fair tribunal."

As noted in a portion of Petitioner's brief before the Georgia Supreme Court:

On the first day of trial, no less than three incidents occurred demanding a mistrial. The Court had already granted the Petitioner's motion to prohibit the use of the word "murder" insofar as this was the ultimate issue for the jury to determine. The prosecutor was aware of the trial court's position on this. Nonetheless, he "neglected" to inform their witness not to conclude that the case was a "murder" case, which is exactly what occurred . . . [l]ater that day, a member of the decedent's family engaged in the above referenced outburst in open court. Again, no mistrial was granted. Finally, the State was allowed to introduce testimony from it's own witness that the Petitioner just ". . . shot him [the decedent] down like a dog." Each of the above incidents, and certainly all of the above incidents taken together violated Petitioner's right to a fair trial, as well as his right to have his fate determined by impartial jurors. Repeated incidents of misconduct by the victim's family and the elicitation of improper and highly prejudicial and harmful statements by witnesses for the State, by the State, were permitted to occur. The Petitioner was entitled to a fair trial under the Constitutions of the United States and State of Georgia. The conduct of the State and the family of the deceased prevented that from occurring. Repeated incidents of outbursts, violations of Court orders, and the final extraordinarily prejudicial statement of the witness who stated that the decedent was shot down like a dog demand that the Petitioner be retried in an atmosphere free of the outrageous denials of the Sixth Amendment which occurred in this case. It is impossible to ask a jury to return a verdict of non-guilty while family members

parade inside the courtroom in pins, and shout encouragement to "helpful answers" of the witnesses, where the State violates a Court order in eliciting the word "murder" which just happens to be the ultimate issue of fact for the jury, and where finally a witness testifies that the decedent "was shot down like a dog." Any of these incidents should entitle the defendant to a reversal. It is critical to note that the Petitioner did not cause any of these problems. The trial atmosphere and the combined effects of these incidents demand the reversal of Petitioner's conviction. We know that this case was tried in 1997 in Dekalb County, Georgia. We pride ourselves on living and working in a State where we live by rules that require the accused, whether it be this Petitioner or any other Petitioner, to receive a fair trial. It simply didn't happen in the case at bar.

Accordingly, the Petitioner requests that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

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